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Supreme Court, U.S.
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No. 04-992

IN THE

Supreme Court of the United States

D.T.B., a minor child, by his next friend,
DANIEL J. O'CALLAGHAN and
DANIEL J. O'CALLAGHAN, Pro Se,
on his own behalf,

Petitioner,

v.

HON. JOHN J. FARMER, JR. in past or present official capacity as Attorney General of the State of New Jersey; HON. JOHN J. HARPER, in his past or present official capacity as Justice of the Superior Court of New Jersey, Chancery Division, Family Part; ANN T. SCUCCI; MATHIAS R. HAGOVSKY and DAVID F. SALVAGGIO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT MATHIAS R. HAGOVSKY, Ph.D.

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QUESTION PRESENTED

Whether the Third Circuit Court of Appeals erred by upholding the District Court's determination that Respondent Dr. Mathias R. Hagovsky, was immune from liability, as a court appointed psychologist pursuant to *Hughes v. Long*, 242 F.3d 121 (3d Cir. 2001).

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STATEMENT OF THE CASE

The genesis of this matter was a paternity, custody and/or visitation action filed by Petitioner Mr. O'Callaghan against V.R.B. in the New Jersey Superior Court, Chancery Division, Family Part, Morris County (hereinafter the "Family Court"). [A 114-115][1]. The matter was assigned to co-Respondent, the Honorable John J. Harper. [A 116]. On or about August 25, 2000, Judge Harper appointed Dr. Hagovsky as a court appointed psychologist who was to perform a psychological evaluation of Petitioners, Mr. O'Callaghan, D.T.B. (Appellant's minor son) and V.R.B. (D.T.B's natural mother). [A179-181].

On February 6, 2001, Petitioners filed a Complaint in the United States District Court, District of New Jersey alleging that Judge Harper and several other individuals had violated Petitioners' civil rights. [A41]. On April 5, 2001, Petitioners filed an Amended Complaint in the United States District Court, District of New Jersey wherein Petitioners alleged that Respondent Dr. Hagovsky violated his constitutional rights. [A52-110]. The Complaint against Judge Harper was dismissed by the District Court by Opinion and Order dated August 9, 2001. [A5-19]. Subsequently, the District Court granted Respondent Dr. Hagovsky's Motion for Summary Judgment by Order entered September 30, 2003 [A32-33; 570-86.].

On September 14, 2004, The United States Court of Appeals for the Third Circuit affirmed the August 9, 2001 and September 30, 2003 Orders of the District Court dismissing Petitioners' Complaint. [Appendix E 21a-23a].

1. "A" refers to the Joint Appendix filed by Defendants-Appellees in the Third Circuit Court of Appeals.

STATEMENT OF FACTS

Petitioner, Mr. O'Callaghan alleges he and his natural son, D.T.B.'s civil rights were violated by the actions of the Respondents, Dr. Mathais R. Hagovsky, the Honorable John J. Farmer, the Honorable John J. Harper, Ann T. Scucci and David F. Salvaggio. [A52-110]. These baseless allegations arise from a paternity, custody and/or visitation action filed by Appellant Mr. O'Callaghan against V.R.B. in the Family Court. [A 114-115].

1. APPOINTMENT, SCOPE AND DUTIES OF DR. HAGOVSKY

The Family Court matter was initially handled by Judge Harper. [A116]. On August 25, 2000, Dr. Hagovsky was appointed by Judge Harper as a court appointed psychologist to perform a psychological evaluation of Petitioner, O'Callaghan, D.T.B. (Petitioner's minor son) and V.R.B. (D.T.B's natural mother). [A179-181]. Dr. Hagovsky's duties were initially set forth in the August 25, 2000 Order. The Order provided in part that:

> 2) the minor child is to see a therapist and parents to meet with therapist and participate and cooperate in all aspects of therapy and with regards to visitation and custody.
>
> 3) therapist appointed is Dr. Mathia [sic] Hagovsky

[A179-181]. These duties were further clarified by Judge Harper in an Order issued on October 27, 2000. [A269-271]. Therein Judge Harper stated the following:

> The psychologist, among any issues he/she deems appropriate, is also to conduct an examination/ investigation including, but not limited to, evaluations of both the parties and the child, addressing parenting time of the child with plaintiff, including overnights, as well as any potential parental alienation.

[A269-271 at ¶9].

2. DELAY OF COURT ORDERED PSYCHOLOGICAL EVALUATIONS

Throughout the Family Court proceedings, Petitioner Mr. O'Callaghan challenged the appointment of Dr. Hagovsky. [A52-110]. On or about August 30, 2000, Mr. O'Callaghan filed an order to show cause seeking, among other things, a temporary stay of the appointments. [A201-203]. As a result, no appointments were scheduled by the parties with Dr. Hagovsky at that time. [A64 ¶51]. On or about September 15, 2000, Mr. O'Callaghan requested that an alternative psychologist be used to perform the evaluation. [A245]. That request was denied by the court. [A245].

In October 2000, Mr. O'Callaghan petitioned the Superior Court of New Jersey Appellate Division and the New Jersey Supreme Court for an interlocutory appeal. Both requests for leave to appeal were denied. [A267-268]. On or about October 19, 2000, Mr. O'Callaghan filed an Order to Show Cause to recuse Judge Harper. [A263-264]. Judge Harper adjourned plaintiff's Order to Show Cause until December 8, 2000. [A72 at ¶85-87].

In early December 2000, an appointment for the evaluations of V.R.B. and D.T.B. were scheduled with Dr. Hagovsky. [A579-581]. Those evaluations took place on December 16, 2000. [A580 at ¶6]. No appointment was ever scheduled for Mr. O'Callaghan. [A580 at ¶7]. Dr. Hagovsky received two letters from Mr. O'Callaghan and left voicemail messages for Mr. O'Callaghan, however, the two never spoke. [A580 at ¶7]. Shortly thereafter, Appellants filed their complaints in the District Court. [A41 and A52].

Petitioners appear to base their violation of civil rights asserted against Dr. Hagovsky on the timeliness of his psychological evaluations of D.T.B. and V.R.B. as well as his inability to evaluate Mr. O'Callaghan. [A52-110]. There is no basis in fact to support the Petitioners' claims or the within appeal.

On February 6, 2001, Judge Harper issued a Letter Decision wherein he summarized the proceedings to date, in part, as follows:

> This Court is satisfied from the plaintiff's [Mr. O'Callaghan] conduct and the defendant's [V.R.B.] certifications that at no time did Mr. O'Callaghan cooperate with this Court's efforts to have . . . a Psychologist assess the parenting abilities of the parties and provide an evaluation . . . The Court appointed qualified professionals to assist it in fact-finding only to have its efforts constantly frustrated by the plaintiff who sought to challenge the appropriateness of the appointments and who resisted cooperating. Incredibly, plaintiff now claims that it was the Court who failed to see to it

> that the professionals had completed their assignments in a timely fashion. The plaintiff apparently fails to comprehend the inconsistency of his position and seeks only to blame the Court instead of himself for the failure of the professionals to complete their assignments. It is evident that Mr. O'Callaghan is seeking to delay and frustrate the Court's efforts to gather facts about this matter through legal maneuvering and challenges. There is no other reasonable or appropriate explanation.
>
> Plaintiff's arguments are circular. He seeks to point to everyone else as the cause of the delay. I daresay, if he had cooperated, met with Ms. Succi, and allowed her to complete her work, we would have had her report by now. The same is true for Dr. Hagovsky. It becomes evident that the plaintiff is obsessed with legal challenges and cannot see that if he would only allow the Court appointed professionals to do their work and submit to this fact-finding effort, the Court then would be in the position to address the issue about which he complains, namely, whether the child has been traumatized, and if so, by whom. He blames the Court for the delay which he has occasioned.

[A424-439 at p. 4-5].

It is clear from the record that any cause in delay or inability to fulfill Dr. Hagovsky's duties as a court appointed psychologist rest with Mr. O'Callaghan.

3. RESPONDENT DR. HAGOVSKY DID NOT WAIVE HIS AFFIRMATIVE DEFENSES

Dr. Hagovsky is entitled to immunity pursuant to *Hughes v. Long*, 242 F.3d 121 (3d Cir. 2001). This affirmative defense was pled in Dr. Hagovsky's Answer to the Amended Complaint. [A482-495]. Specifically, Dr. Hagovsky's Seventeenth Affirmative Defense states as follows: "The conduct of this defendant, was justified under the circumstances, and was **privileged** and based on reasonable and probable cause." [Emphasis added]. [A482-495].

SUMMARY OF ARGUMENT

For the reasons set forth in the argument, which follows, Respondent respectfully requests that this court uphold the Third Circuit Court of Appeals' affirmation of the District Court's entry of summary judgment in favor of Respondent Dr. Hagovsky because the District Court properly concluded that Dr. Hagovsky was entitled to immunity, as a court appointed psychologist, pursuant to *Hughes v. Long*, 242 F.3d 121 (3d Cir. 2001).

REASONS FOR DENYING THE PETITION

1. THE PETITION IDENTIFIES NO CONFLICT WITH ANY DECISIONS OF THIS COURT OR ANY OTHER COURT

At the time of the alleged wrongdoing, Respondent, Dr. Hagovsky was acting as a court appointed psychologist. Accordingly, he enjoyed judicial immunity because he acted as an arm of the court. *See Hughes v. Long*, 242 F.3d 121 (3d Cir. 2001). Petitioner has identified no U.S. Circuit Court

nor any state court of last resort which disputes this immunity. Nor has Petitioner cited any decision of this Court which conflicts with the holding of *Hughes v. Long* [citation omitted]. Therefore, Respondent respectfully requests the Court deny Petitioner's writ.

2. THE THIRD CIRCUIT COURT OF APPEALS' AFFIRMATION OF THE IMMUNITY AFFORDED RESPONDENT IS CORRECT

A. THE DISTRICT COURT PROPERLY DETERMINED THAT RESPONDENT DR. HAGOVSKY WAS ENTITLED TO JUDICIAL IMMUNITY PURSUANT TO *HUGHES v. LONG*, 242 F.3d. 121 (3d Cir. 2001)

The District Court properly granted Dr. Hagovsky's Summary Judgment Motion as he was immune from liability pursuant to the Third Circuit Court of Appeals' ruling in *Hughes v. Long*, 242 F.3d. 121 (3d Cir. 2001). In *Hughes*, the Third Circuit Court of Appeals held that a court–appointed psychologist enjoyed judicial immunity because he acts as an "arm of the Court". *See Hughes*, 242 F.3d at 127-28, 131. The Third Circuit Court of Appeals reasoned that a court appointed psychologist is a non-judicial person who fulfills a quasi judicial role at the court's request. *Id.* As such, they act at the court's request for the court's benefit. *Id.*

In *Hughes*, *supra*, Pamela Hughes had filed a petition for temporary custody of her children against her former spouse, Peter Hughes. As in this present case, the state court had jurisdiction over the child custody proceeding. *Id.* The state court, in response to the custody petition, ordered

the parties to undergo an evaluation by defendant Long, a licensed clinical social worker. Based upon that evaluation, the court ordered Pamela and Peter Hughes to participate in psychological evaluations. *Id.* In that regard, defendant Long referred the Hughes' to defendants Lacy and McHugh who were court appointed psychologists. The psychologists conducted psychological testing of Peter and Pamela Hughes and reported their findings to the court. *Id.*

Peter Hughes, similar to Mr. O'Callaghan, disagreed with the evaluation and claimed fraudulent behavior by Long, Lacy and McHugh. Hughes then filed a federal court action alleging that his civil rights under 42 U.S.C. § 1983 and § 1985 were violated by the defendants. *Id.* at 123-24.

The Complaint was dismissed by the District Court finding that the defendants were entitled to qualified immunity. *Id.* Plaintiff, Peter Hughes appealed. In response, the Third Circuit Court of Appeals held that the trial judge's dismissal was right but for the wrong reason. *Id.* The Third Circuit Court of Appeals held that a court appointed psychologist is entitled to absolute judicial immunity from civil rights suits involving the judicial process. *See Hughes, supra*, 242 F.3d. at 127-28, 131. This immunity gives functionaries of the judicial system the ability to perform their tasks and apply their discretion without threat of retaliatory § 1983 litigation. *See Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978). Based upon this immunity, witnesses including public officials and private citizens are immune from civil damages based upon their testimony. *See Brisco v. LaHue*, 460 U.S. 325, 341, 345-46 (1983).

The Third Circuit Court of Appeals reasoned that psychologists are afforded absolute judicial immunity

because they are non-judicial persons who fill a quasi-judicial role at the court's request. *Hughes*, *supra*, 242 F.3d at 127-28. The Third Circuit Court of Appeals further reasoned that court appointed experts in custody evaluation cases are acting as an "arm of the Court" in areas where the court had no expertise. *See Hughes*, *supra*, at 124.

In the present case, Respondent Dr. Hagovsky, similar to Defendants Long and McHugh in the *Hughes* case, was a court appointed psychologist. Dr. Hagovsky was appointed by the Honorable John J. Harper, J.S.C., to conduct an examination of the parties and report to the court in connection with the custody hearing. [A179-181 and A269-271]. As a result, Dr. Hagovsky is entitled to absolute judicial immunity because he was functioning as an arm of the court in a quasi-judicial role at the request of the court.

In light of the foregoing, Respondent Dr. Hagovsky is entitled to judicial immunity. As discussed, judicial immunity is absolute. *See Brisco*, *supra* at 345-46 and *Stump*, *supra*, at 356-57. Therefore, as a matter of law, Dr. Hagovsky was entitled to judicial immunity for any and all action undertaken by him in connection with his duties as a court appointed psychologist in the Family Court proceedings. Accordingly, the District Court properly granted Dr. Hagovsky's Motion for Summary Judgment.

B. RESPONDENT DR. HAGOVSKY DID NOT WAIVE THE AFFIRMATIVE DEFENSES AFFORDED TO HIM PURSUANT TO *HUGHES v. LONG*, 242 F.3d 121 (3RD CIR. 2001).

As set forth in Respondent's Argument, Dr. Hagovsky is entitled to immunity pursuant to *Hughes v. Long*, 242 F.3d. 121 (3d Cir. 2001). This affirmative defense was pled in Dr. Hagovsky's Answer to the Amended Complaint. [A482-495]. Specifically, Dr. Hagovsky's Seventeenth Affirmative Defense stated as follows: "the conduct of this defendant, was justified under the circumstances, and was **privileged** and based on reasonable and probable cause." [Emphasis added]. [A482-495, 493 at ¶17].

Privilege is defined as an "immunity held by a person or class, not generally possessed by others." *See*, BLACK'S LAW DICTIONARY 1197 (3d Ed. 1990). By pleading in his Answer that his conduct was privileged, Dr. Hagovsky asserted the affirmative defense of judicial immunity accorded him by *Hughes*. The foregoing is consistent with the intent of Federal Rule of Civil Procedure 8(f) which provides that "all pleadings shall be construed as to do substantial justice." Fed. R. Civ. P. 8(f).

The issue of waiver of an affirmative defense was addressed by the Third Circuit Court of Appeals in the matters of *Charpentier v. Godsil*, 937 F.2d 859 (3d Cir. 1991) and *Kleinknecht v. Gettysburg College*, 989 F.2d 1360 (3d Cir. 1993). In *Charpentier*, the Appellant alleged that an Respondent/physician had waived the affirmative defense of immunity afforded the physician under the New Jersey Tort Claims Act, N.J.S.A. 59:6-5 (hereinafter the "TCA"). *See Charpentier*, 937 F.2d at 863. There the physician did

not raise the defense until he joined a trial brief submitted by a co-defendant who had pled the immunity afforded under the TCA. *See id.* The Third Circuit Court of Appeals commented that the "failure to raise an affirmative defense by responsive pleading or appropriate motion does not always result in waiver." *See id.* [citation omitted]. The Third Circuit Court of Appeals noted that:

> Under Fed.R.Civ.P. 15(a), a responsive pleading may be amended at any time by leave of court to include an affirmative defense, and "leave shall be freely given when justice so requires." Unless the opposing party will be prejudiced, leave to amend should generally be allowed.

See id. at 864-865 [citation omitted].

Moreover, an affirmative defense is not waived if raised by the defendant at a pragmatically sufficient time, provided the plaintiff is not prejudiced. *See id.* at 865 [citations omitted]. The Third Circuit Court of Appeals concluded that the defendant/physician had not waived the immunity afforded under the TCA because the plaintiff was alerted to these defenses by the pleadings of the other defendants. *See id.*

In *Kleinknecht*, the defendant failed to raise the affirmative defense of immunity under Pennsylvania's Good Samaritan law in its responsive pleading. *See id.* 989 F.2d at 1373. The defendant raised this defense for the first time when it filed a summary judgment motion. *See id.* Relying upon *Charpentier*, the Third Circuit Court of Appeals held that the defendant did not waive the affirmative defense as it was raised in the Summary Judgment motion and there was no allegation of prejudice. *See id.* at 1374.

If the Court is inclined not to accept Respondent's assertion that the immunity afforded under *Hughes* was pled in Dr. Hagovsky's Seventeenth Affirmative Defense, Respondent respectfully asserts that the defense was preserved pursuant to *Kleinknecht* and *Charpentier.* As in those cases, the immunity afforded under *Hughes* was raised at a pragmatic time and without prejudice to the Appellants. Clearly, if this matter were remanded to the District Court, the District Court would have adequate authority to grant Dr. Hagovsky leave to amend his responsive pleading to assert this affirmative defense.

In light of the foregoing, Respondent Dr. Hagovsky did not waive the affirmative defense of judicial immunity afforded him under *Hughes*.

CONCLUSION

For the reasons set forth herein, Respondent respectfully requests that the Petition for Certiorari should be denied

Respectfully submitted,

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